MOTION FILED OCT 9 1990

No. 90-344 and No. 90-367

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TRANSWESTERN PIPELINE COMPANY,
Petitioner,
v.

KANSAS POWER AND LIGHT COMPANY, *et al.*,
Respondents.

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,
v.

PUBLIC UTILITIES COMMISSION OF CALIFORNIA and KANSAS POWER & LIGHT COMPANY,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Interstate Natural Gas Association of America ("INGAA") respectfully moves pursuant to Rule 37.2 for leave to file the attached brief *amicus curiae* in this case. Petitioners have consented to INGAA's filing of this brief. The consent of respondent, Kansas Power and Light Company, was requested but refused.

STATEMENT OF INTEREST

INGAA is a non-profit national trade association representing virtually all of the major interstate natural gas

transmission companies operating in the United States. The companies account for over 90 percent of all natural gas transported and sold for resale in interstate commerce. INGAA's members also include major Canadian interprovincial pipelines subject to regulation by the National Energy Board of Canada. INGAA's U.S. members are regulated by the Federal Energy Regulatory Commission ("Commission") under the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717 *et seq.* (1988), and, to a lesser extent, under the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301 *et seq.* (1988).

REASONS FOR GRANTING THE MOTION

This case involves orders of the Commission which permitted a natural gas pipeline to direct bill its customers for the balance remaining in a purchased gas cost account (Account No. 191) when the pipeline terminated the account upon implementation of a gas inventory charge pursuant to the Commission's Order No. 500. 52 Fed. Reg. 30,334, III FERC Stats. & Regs. ¶ 30,761 (1987). The United States Court of Appeals for the District of Columbia Circuit held that notwithstanding the Commission's finding of "good cause" for waiving the notice requirement in Section 4(d) of the NGA, the direct billing by the pipeline of such costs constituted retroactive ratemaking in violation of the filed rate doctrine. *Transwestern Pipeline Co.* v. *FERC*, 897 F.2d 570 (D.C. Cir. 1990).

The issue in this case is therefore similar to the issues presented in *FERC* v. *Associated Gas Distributors*, *petition for cert. pending*, No. 89-2016 (filed June 21, 1990), in which the Commission has sought review of another D.C. Circuit opinion which held that a Commission order authorizing a pipeline's recovery of take-or-pay costs using the purchase deficiency methodology prescribed in Order No. 500 violated the filed rate doctrine. *Associated Gas Distributors* v. *FERC*, 893 F.2d 349 (D.C. Cir. 1989) ("*AGD II*"). INGAA has filed a motion for leave to file

amicus curiae in support of the Commission's petition for writ of certiorari in that case. Additionally, the issues in this case are similar to those raised by the Commission and certain pipelines in their respective petitions for certiorari in *FERC* v. *Columbia Gas Transmission Corporation, petition for cert. pending*, No. 90-131 (filed July 18, 1990) and *Panhandle Eastern Pipe Line Company* v. *Columbia Gas Transmission Corporation, petition for cert. pending*, No. 89-2001 (filed June 22, 1990). Those petitions seek review of a decision of the D.C. Circuit which held that notwithstanding the Commission's finding that "good cause" existed to waive the notice requirement of NGA Section 4(d), the direct billing by pipelines for certain production costs that the Commission had previously required the pipelines to pay producers for past sales of gas constituted a violation of the filed rate doctrine. *Columbia Gas Transmission Corp.* v. *FERC*, 895 F.2d 791 (D.C. Cir. 1990) ("*Columbia II*"). INGAA has also filed a motion for leave to file *amicus curiae* in support of the petitions for writ of certiorari in that case.

The court of appeals in the case herein, as in *AGD II* and *Columbia II*, has unjustifiably extended the filed rate doctrine and failed to accord proper deference to the ratemaking authority vested in the Commission by Section 4 of the NGA. The result of the court of appeals' actions is to prohibit the collection of prudently incurred purchased gas costs, the recovery of which is guaranteed under Title VI of the NGPA. Moreover, the decision below has the practical effect of thwarting efforts of the entire natural gas pipeline industry to make a full transition to competitive markets and thus to put the economic vestiges of past regulatory schemes behind them. The gas inventory charge mechanism adopted by the Commission's Order No. 500 is an integral part of the Commission's policy for addressing future take-or-pay responsibility in the new competitive environment. The Commission's determination that pipelines may direct bill the balance of gas costs in their Account No. 191 upon implementation of a gas in-

ventory charge is a vital step in the industry's transition process. While the magnitude of such costs varies by pipeline, the costs at issue herein are substantial—as much as several hundred million dollars for a single pipeline.

INGAA, as representative of the interstate natural gas pipeline industry which is directly affected by the court of appeals' decision, has a unique perspective and interest which will aid this Court in its consideration of the issues herein.

CONCLUSION

WHEREFORE, for the foregoing reasons, INGAA respectfully requests that the following brief in support of petitioners be accepted for filing.

Respectfully submitted,

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BRIEF AMICUS CURIAE ON BEHALF OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The Interstate Natural Gas Association of America ("INGAA") is a non-profit national trade association representing virtually all of the major interstate natural gas transmission companies operating in the United States. The companies account for over 90 percent of all natural gas transported and sold for resale in interstate com-

merce. INGAA's members also include major Canadian interprovincial pipelines subject to regulation by the National Energy Board of Canada. INGAA's U.S. members are regulated by the Federal Energy Regulatory Commission ("Commission") under the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717 *et seq.* (1988), and, to a lesser extent, under the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301 *et seq.* (1988).

SUMMARY OF ARGUMENT

The decision below, *Transwestern Pipeline Co.* v. *FERC*, 897 F.2d 570 (D.C. Cir. 1990), is one of three cases in which the United States Court of Appeals for the District of Columbia Circuit has applied a novel and erroneous interpretation of the "filed rate doctrine" that directly contradicts this Court's prior decisions and undermines the Commission's statutory authority to prescribe "just and reasonable" rates for sales and transportation of natural gas in interstate commerce. In *Associated Gas Distributors* v. *FERC*, 893 F.2d 349 (D.C. Cir. 1989) ("*AGD II*"), *petitions for cert. filed*, 59 U.S.L.W. 3001 (U.S. June 20, 1990) (No. 89-1988), 59 U.S.L.W. 3001 (U.S. June 21, 1990) (Nos. 89-1989, 89-1990), 59 U.S.L.W. 3001 (U.S. June 22, 1990) (No. 89-2000), and 59 U.S.L.W. 3005 (U.S. June 21, 1990) (No. 89-2016), the court of appeals held that an allocation of take-or-pay costs among pipeline customers based on a "purchase deficiency" method violated the filed rate doctrine.[1] Similarly, in *Columbia Gas Transmission Corp.* v. *FERC*, 831 F.2d 1135 (D.C. Cir. 1987), *modified on reh'g*, 844 F.2d 879 (D.C. Cir. 1988) ("*Columbia I*"), and *Columbia Gas Transmission Corp.* v. *FERC*, 895 F.2d 791 (D.C. Cir. 1990) ("*Columbia II*"), *petitions for cert. filed*, 59 U.S.L.W. 3005 (U.S. June 22, 1990) (No. 89-2001) and 59 U.S.L.W. 3065 (U.S. July 18, 1990) (No. 90-131),

[1] The Commission had approved such an allocation methodology because it reasonably reflected customer responsibility for the incurrence of the allocated costs.

the court withheld the deference due the Commission by holding that an order allowing natural gas pipelines to recover through "direct bills" costs which pipelines had been required to pay producers for past sales of gas constituted unlawful retroactive ratemaking and thereby violated the filed rate doctrine. INGAA has filed as *amicus curiae* in support of petitioners in both of those proceedings.

In the instant case, the court of appeals has once again improperly applied the filed rate doctrine, and in doing so has failed to accord the Commission due deference pursuant to the standards established in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"). Moreover, by expanding this Court's prior construction of the filed rate doctrine, the decision below invalidates a crucial element of the Commission's program to prevent a recurrence of the take-or-pay crisis that has severely hampered the Commission's efforts to promote competition in the interstate natural gas pipeline industry during the past decade. The Commission has concluded that to avoid future take-or-pay problems pipelines should be authorized to establish a gas inventory charge ("GIC") to handle the costs of maintaining a gas inventory responsive to customer needs. By striking down the cost recovery mechanism designed to enable pipelines to make the transition from the old ratemaking method to GICs, the decision seriously jeopardizes the Commission's entire program for dealing with future take-or-pay.

This case presents issues which are critical to the natural gas pipeline industry in making the transition to a more competitively-oriented market. In addition, the court of appeals' improper application of the filed rate doctrine in this case raises issues similar to those addressed by the Commission in its petitions for writ of certiorari in *AGD II* and *Columbia II*. INGAA therefore recommends that certiorari be granted herein.

ARGUMENT

I. THE DECISION BELOW JEOPARDIZES THE COMMISSION'S PROGRAM TO RESTRUCTURE THE GAS INDUSTRY ALONG MORE COMPETITIVE LINES

The central barrier to the Commission's effort during the 1980's to reshape the natural gas industry and promote competition in gas supply markets has been the system of take-or-pay contracts entered into by pipelines and producers during the prior decades. As recognized by the court of appeals in *Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) ("*AGD I*"), the Commission could not reasonably adopt one of the key elements of this restructuring—the open-access, non-discriminatory transportation program—without also addressing the issues created by these take-or-pay contracts. The Commission's answer in Order No. 500 was essentially two-pronged. As to the costs of settling *past* take-or-pay disputes or amending uneconomic contracts, the Commission adopted the so-called "equitable sharing" plan at issue in *AGD II*. The Commission addressed future take-or-pay by authorizing pipelines to establish a rate mechanism that would prevent a repetition of the crippling build-up of take-or-pay costs that plagued the industry under the prior system. The mechanism—a "gas inventory charge"—was specifically designed to "help pipelines restructure their service obligations to customers and their purchase obligations to producers so as to reflect the realities of anticipated future operations and prevent future take-or-pay problems." Order No. 500, 52 Fed. Reg. 30,334 at 30,346, III FERC Stats. & Regs. ¶ 30,761 at 30,793 (1987).

In practical effect, GICs, such as the one granted Transwestern Pipeline Company ("Transwestern"), were intended to replace the traditional purchased gas adjustment ("PGA") cost recovery mechanism by compensating

pipelines for standing ready to provide sales services to the extent of customer nominations.[2] To the extent a customer does not take the volumes it nominates, it pays an inventory charge. This is the pipeline's compensation for its gas supply service.

A number of pipeline applications have been filed with the Commission to implement GICs and eliminate the pipelines' PGA clauses. A necessary element of any such GIC is a means to recover the remaining balance of unrecovered gas costs at the time the PGA is terminated and the GIC takes effect. As noted by the Commission in its petition for writ of certiorari herein, the decision below precludes recovery of these remaining balances and may deter pipelines from instituting gas inventory charges. This will thwart the Commission's policy of avoiding future take-or-pay problems and encouraging competition. Petition at 9-10.

The plain fact is that a pipeline is highly unlikely to institute a gas inventory charge if the price of doing so is to preclude recovery of substantial unrecovered purchased gas costs.[3] It is not feasible for a pipeline to institute a new gas pricing mechanism keyed to competitive

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[2] Transwestern's PGA was a cost recovery mechanism similar to one that has been widely used by regulated interstate pipelines with the approval of the Commission. PGAs were instituted in 1972 when pipelines served as the primary merchants of natural gas, and when, for the most part, gas producers sold directly to pipelines, and pipelines subsequently resold the gas. PGA cost recovery mechanisms were designed to enable pipelines to manage their gas acquisition programs without having to file new rate cases in response to frequent variations in gas costs. Thus, any pipeline with a PGA provision in its tariff could defer to Account No. 191 any over- or undercollections of actual purchased gas costs. It is the court of appeals' denial of recovery of these Account No. 191 amounts by direct billing that is at issue here.

[3] The magnitude of such costs varies by pipeline, of course, but INGAA is aware of Account No. 191 balances of nearly $200 million on a single pipeline.

gas markets if it is forced to absorb prudently incurred costs in meeting its certificated sales service obligations. To the extent that pipelines are forced to absorb such costs, it will undercut the pipelines' merchant function, and prevent them from having a meaningful role in the gas sales market. The Commission's determination that pipelines may directly bill costs deferred to Account No. 191 is thus a vital step in the industry's transition process. It authorizes a just and reasonable—and lawful—rate methodology that suits the industry's current circumstances and properly assigns costs to customers who were responsible for their incurrence.

II. THE DECISION BELOW UNJUSTIFIABLY EXPANDS THE FILED RATE DOCTRINE AND PREVENTS PIPELINES FROM RECOVERING THEIR COSTS

When Transwestern filed for authority to bill the costs at issue directly it proposed no change in rates that would implicate the filed rate doctrine. Instead, it merely sought to alter the *mechanism* for recovery of purchased gas costs which were properly included in Account No. 191. Had Transwestern simply continued its purchased gas adjustment provision, such costs would have been collected in the normal course of events. Although the Account No. 191 costs at issue arose from past purchases, the proposed direct bill in no way altered the rates associated with past purchases. The decision below therefore is premised on a fundamental, but erroneous, assumption: that a direct bill to eliminate the remaining Account No. 191 balance transforms otherwise proper charges into retroactive rates. In the court of appeals' view, because the cost recovery mechanism changed—from the PGA surcharge to a direct bill—Transwestern should be denied recovery of purchased gas costs which were incurred on behalf of Transwestern's sales cus-

tomers and for which there has been no claim of imprudent action.[1]

The court of appeals' decision, if affirmed, will deny pipelines the reasonable opportunity to recover prudently incurred costs to which they are statutorily entitled. The result of the decision below, therefore, is directly at odds with this Court's clear guidance in *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944) ("*Hope*"). Moreover, the court's decision defies the rule of *Chevron, supra*, concerning statutory construction and the deference due an agency interpreting its organic statute. Because the costs at issue were prudently incurred, and because the "end-result" reached by the Commission was the product of a "permissible" interpretation of the authority vested under Section 4 of the NGA, the Commission must be sustained. *See Hope* and *Chevron, supra.* Finally, further support for upholding the Commission is found in Section 601(c) of the NGPA, 15 U.S.C. § 3431(c) (1988), which guarantees, absent fraud, abuse, or similar grounds, that pipelines may pass through any amounts paid with respect to any purchase of natural gas. The reality is that the court of appeals' decision would make fair and compensatory cost recovery a practical impossibility given the transformation in natural gas markets over the last decade. *See AGD I*, 824 F.2d at 1025-1026.

INGAA submits that certiorari should be granted in this proceeding for the same reasons set forth in INGAA's brief *amicus curiae* in *AGD II* and *Columbia II*: that is, the D.C. Circuit has incorrectly and unjustifiably expanded the filed rate doctrine as well as the rule against

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[1] In authorizing Transwestern's direct billing, the Commission stated that "[t]o require Transwestern to absorb potential undercollections related to gas purchases made before implementation of the GIC would be unreasonable because there is no showing that the costs at issue have been imprudently or abusively incurred." *Transwestern Pipeline Company*, 44 FERC ¶ 61,164 at 61,537 (1988).

retroactive ratemaking and has thereby improperly limited the Commission's ratemaking authority by substituting its judgment for that of the Commission. As noted by the Commission and Transwestern in their respective petitions for certiorari herein, the D.C. Circuit in this case followed essentially the same analytical approach as it did in *AGD II* and the *Columbia* decisions.

CONCLUSION

For the foregoing reasons, the petitions for writ of certiorari should be granted.

Respectfully submitted,

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